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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 21, Original

EX PARTE: ARTHUR T. LA PRADE, PETITIONER

ON RULE TO SHOW CAUSE WHY LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION AND WRIT OF MANDAMUS SHOULD NOT BE GRANTED AS PRAYED

BRIEF OF RESPONDENTS

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Phoenix, April 6, 1933.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No.____, Original

EX PARTE: ARTHUR T. LA PRADE, PETITIONER

BRIEF OF RESPONDENTS

OPINION BELOW

The interlocutory opinion of the District Court, which among other things denied defendant's motions to dismiss the bills, was dated July 7, 1930 and is reported as *Southern Pacific Company v. Peterson, Attorney General of Arizona*, 43 F. (2d) 198.

On March 8, 1933—one day after the petition herein was verified and five days before the motion for leave to file it was presented by petitioner to this Court—the District Court filed its opinion on the final hearing, together with findings of fact and conclusions of law in the consolidated cases, and final decrees in each case. That opinion does not appear in the petition and is not officially reported, but a copy thereof is annexed as Exhibit G to the Return. In it there are considered *inter alia* the objections of petitioner—the present Attorney General of Arizona—to the order of February 8, 1933 substituting him as defendant in each case for his immediate predecessor, K. Berry Peterson, pursuant to Section 780, Title 28, U. S. C. (Return, p. 32 *et seq.*)

The petition now sought to be filed was verified on March 7, 1933, at Phoenix, but was not presented to this Court until March 13, 1933.

Questions Presented

The principal questions raised by the petition and the brief of petitioner submitted with his motion for leave to file the petition are:

1. Whether there appears a proper case for mandamus.

2. Whether the suits described in the petition, which were brought against petitioner's immediate predecessor in office as Attorney General of Arizona and involved the constitutionality of the Arizona Train Limit law (Sec. 647, Arizona Rev. Code, 1928) and which also related to the present or future discharge of the official duties of the Attorney General of Arizona, abated upon the expiration of the term of office of the original defendant, or whether they were properly continued and maintained against petitioner under the express terms of the Federal Substitution statute. (Sec. 780, Title 28, U. S. C., Act of Feb. 13, 1925, c. 229, sec. 11, 43 Stat. 941)

3. Whether said Substitution statute, as construed and applied by the District Court to permit the substitution of petitioner, is valid or is in conflict with the Fifth, Tenth or Eleventh Amendment.

4. Whether because of the provisions of the constitution and laws of Arizona, creating the office of Attorney General and prescribing his duties, and requiring each Attorney General to perform such duties, including the enforcement

> of the Train Limit statute, until his successor is elected and qualified, and also because of the Arizona Train Limit Defense statute approved March 13, 1931 (c. 63, p. 132, Session Laws, 1931) defendant was properly substituted irrespective of said Substitution statute.

For the alleged purpose of showing that his refusal to consent to substitution was justifiable, but without submitting to the decision of this Court the question of whether he should have consented or should now consent to such substitution, petitioner claims the District Court should have (a) granted the motion of his predecessor—overruled in July, 1930—to dismiss the bills of complaint; (b) heard the evidence itself instead of referring (in July, 1930) the cases to a Master who completed the taking of evidence almost two years ago; and (c) granted the motion of petitioner's predecessor to suppress the Master's report, which has now been denied by the District Court, after considering an extensive record made thereon which is not before this Court in the form required by Equity Rule 75 or otherwise. But those matters, in addition to being matters not now properly reviewable by mandamus under the circumstances, are wholly irrelevant to any question submitted for decision by the petition and have no bearing upon whether the suits should have been dismissed for lack of jurisdiction when the original defendant's term of office expired.

Petitioner attempts to raise the question of whether by participation in such final hearing he would have incurred possible liability for costs theretofore incurred, but that question is not involved herein because petitioner did not participate but with his counsel walked out of the court room, and because in the final

decrees thereafter entered no costs were assessed against petitioner. Neither the Federal Substitution statute nor the substitution order of the court contains any provisions as to the assessment of costs, which in equity cases is a matter within the discretion of the court and is ordinarily adjudicated in the final decree and not before.

In the petition it is alleged the District Court had no power to hear the motion to substitute at San Francisco, California, although no such objection was made at the hearing (Pet. par. 10, pp. 6, 7). Because the motion was noticed for hearing at San Francisco pursuant to an oral agreement with one of petitioner's counsel, of which neither petitioner nor his attorney in this Court was informed prior to the filing of the petition, we are advised that the objection to the power of the court to hear the motion at San Francisco will be withdrawn by petitioner.

STATEMENT

The Bills of Complaint, Application for Temporary Injunction, and Motions to Dismiss

The bills of complaint (Pet. 21-80) in the suits which are the subject of this matter, allege that the Arizona Train Limit law (Sec. 647, Rev. Code, 1928) is void because it (a) invades both the exclusive and occupied legislative fields of Congress under the Commerce Clause, (b) imposes an undue and unlawful burden on interstate commerce in violation of the Commerce Clause, and (c) is so unreasonable that it contravenes the due process clause of the Fourteenth Amendment. That law prohibits the operation of

"any train consisting of more than seventy freight, or other, cars, exclusive of caboose" and of "any passenger train consisting of more than fourteen cars" over any line of railroad "or any portion thereof." It also fixes a penalty of from $100 to $1,000 for each offense and provides that "such penalty *shall* be recovered and suits therefor brought by the Attorney General, or under his direction."

The bills further allege (Pet. 47, 76) that it was the duty of the defendant, K. Berry Peterson, the duly elected, qualified and acting Attorney General of Arizona, to prosecute all violations of said law and that unless restrained and enjoined he would do so; and appropriate allegations as to the amount and irreparable nature of the damages sustained by plaintiffs because of said Train Limit law were made. Each bill prayed for a temporary and permanent injunction.

Defendant filed in each case a motion to dismiss (Pet. 79-80) in which, among other things, he asserted the suits were brought against the State of Arizona in violation of the Eleventh Amendment. Those motions and plaintiffs' applications for temporary injunctions were heard together before the District Court at San Francisco, California, and both the motions and the applications were denied (43 F. (2d) 198).

The Reference, Master's Report and Motion to Suppress

Thereupon by orders dated July 25, 1930, the cases were consolidated for all purposes and over the objection of defendant (Pet. 4) referred to a special master.

The order of reference (Return, 17) recited the complicated and voluminous character of the facts involved; that the taking of evidence would probably consume at least six weeks; and that in justice to other litigants the court did not deem it proper to hear the evidence itself.

Defendant thereupon filed a formal motion (Return, 19) to vacate the order of reference and assigned various reasons therefor, among others that a three-judge court has no power to refer to a master a case involving the constitutionality of a state statute and that the reference was improper under Equity Rule 59; but he did not then or at any time prior to the filing of the Master's report assert that the Master selected by the District Court was in any way objectionable to him. Nor did he attempt by *mandamus* or otherwise to prevent the master from proceeding.

The evidence in the consolidated cases was heard by the master at San Francisco, California and at Phoenix, Arizona. The hearings extended from October 15, 1930 to April 14, 1931 and the transcript of evidence contains over 9,000 pages. Thereafter each of the parties filed an original brief before the master, which was followed by a joint supplemental brief of plaintiffs to which, on April 15, 1932, defendant filed a reply.

On July 29, 1932, the Master filed his report, including the transcript of evidence, with the Clerk of the District Court; and on August 17, 1932, defendant filed his exceptions, contained in 44 printed pages, which by reference were made a part of a separate motion to suppress the Master's report, filed by de-

fendant with his exceptions. Affidavits pertaining to the motion to suppress were then filed.

Setting of Cases for Final Hearing and Continuance.

The District Court set the cases for hearing on the motion to suppress and for final hearing on October 24, 1932—over two months before the expiration of the original defendant's term of office—but upon the objection of defendant and upon his request that the cases be continued for not less than 60 days and that an order be entered permitting him to file a brief on his motion to suppress, and a brief upon the merits, to be answered by plaintiffs, the cases were continued and (Pet. par. 6, p. 5) pursuant to a stipulation of the parties were set for hearing February 8, 1933 at San Francisco. Said stipulation (Return, 21) reads as follows:

> "It is hereby stipulated and agreed by and between the parties in the above entitled cases that the hearing of all matters, now or hereafter involved in both cases, may be held in San Francisco, California, at such time as the Court may designate.
>
> "It is further stipulated and agreed that any decision, order or decree signed, either within or without the State of Arizona, by the three judges, or a majority thereof, and filed with the Clerk of this Court at Phoenix, Arizona, shall have the same force, effect and validity as if made and signed within the District and State of Arizona.
>
> "Dated at Phoenix, Arizona, this 21st day of October, 1932."

It was signed by the original defendant, then Attor-

ney General and now Assistant Attorney General, in his official capacity as Attorney General and not as an individual; and by Charles L. Strouss, then and now an Assistant Attorney General, and Donald R. Richberg, then and now employed by the State of Arizona as a Special Assistant Attorney General in the defense of those cases, both of them also signing officially, (See Stip. Return, pp. 21-22). Mr. Strouss and Mr. Richberg represented both petitioner and his predecessor in the District Court and Mr. Richberg is attorney for petitioner here.

Arizona Train Limit Defense Statute

The Legislature of Arizona passed, as an emergency measure, an act, approved March 13, 1931 (c. 63, p. 142, Laws, 1931) entitled "An Act to Provide Funds for the Defense of Suits to Restrain the Enforcement of the Law of Arizona Limiting the Length of Freight and Passenger Trains", which is hereinafter referred to as the Train Limit Defense statute, and reads as follows:

> "Section 1. To provide funds for the Attorney-General to defend the rights and interests of the people of the state of Arizona in those certain suits pending in the United States district court for the district of Arizona entitled Atchison, Topeka & Santa Fe Railway Company, a corporation, vs. K. Berry Peterson, attorney-general of the state of Arizona, No. 195 E, Phoenix, and Southern Pacific Company, a corporation, vs. K. Berry Peterson, attorney-general of the state of Arizona, No. 196 E, Phoenix, brought to restrain the enforcement of the law of Arizona limiting the length of freight and passenger trains, the sum of twenty thousand dollars, or so much

thereof as may be necessary, is hereby appropriated out of the general fund, and to be expended as follows: For masters' fees, five thousand dollars; for other costs and expenses in defending said suits, fifteen thousand dollars.

Section 2. The state auditor is hereby authorized to draw his warrants, upon claims approved by the attorney-general, and the state treasurer is authorized to pay the same.

Section 3. To provide an appropriation for the support and maintenance of a department of state, it is necessary that this act shall become immediately operative. It is therefore declared to be an emergency measure, and shall take effect upon its passage in the manner provided by law."

We contend and hereinafter argue that said act was and is in effect a mandate to the Attorney General to defend the suits on behalf of the state and that as a result thereof the acts, stipulations and agreements made by the Attorney General and his assistants after the enactment of that statute were those of the State; and that therefore all such subsequent acts, stipulations and agreements of the original defendant and his assistants were binding upon petitioner, the immediate successor of the original defendant.

Briefs on Motion to Suppress and on Final Hearing, Plaintiffs' Substitution Motion, and the Action Taken by the Court on Said Motions and on Final Hearing.

After the cases had been continued at defendant's request and the order made for the filing of briefs, defendant on October 31, 1932, filed with the District Court his brief on motion to suppress and on

November 10, 1932 plaintiffs filed their reply thereto together with their suggested findings and conclusions under Equity Rule 70½. Defendant on December 12, 1932 filed his brief on final hearing and on January 31, 1933 plaintiffs filed their reply thereto.

On January 30, 1933, plaintiffs filed and served on petitioner and his predecessor notice that they would present to the District Court on February 8, 1933, an application for an order substituting petitioner for his predecessor, together with a copy of their application. After the hearing on said motion the court granted it, over the objection of petitioner that the statute did not authorize substitution, and if it did it was unconstitutional. (Pet. par. 10, p. 6). Petitioner thereupon filed a motion to vacate the order and dismiss the cases substantially on the same grounds, which motion also was overruled, exceptions in each instance being duly taken.

After the District Court overruled petitioner's objections (Pet. 6, 8) to the substitution application and his motion to vacate the substitution order and dismiss the cases, and after announcing that he intended to stand thereon, petitioner and his counsel left the court room, whereupon the District Court proceeded on that day and the following day to hear plaintiff's arguments, and thereafter took the following action:

1. On February 9, 1933, the District Court overruled defendant's motion to suppress and his excep-

tions. In so doing (Return, 27) it made the findings set forth in the margin* and also said that "in view of defendant's motion and his request" that the court decide the case on the evidence taken and reported by the Master—

> "The court, instead of treating the Master's report as presumptively correct under Equity Rule 61½, concluded to make, from an independent examination of the evidence taken before the Master, such findings and conclusions as it deems proper pursuant to Equity Rule 70½."

---

* "1. That the detailed findings of the Master are substantially correct and set forth the principal pertinent facts established by the evidence;

"2. That while during his mastership the Special Master became a member of a law firm which prior to and during a part of the mastership was employed by the Pacific Greyhound Lines, Inc., which was not controlled by but was independently operated in active competition with the Southern Pacific Company but in which the Southern Pacific Company had an indirect one-third stock interest, the Master at no time prior to the Motion to Suppress had any personal knowledge of such interest and therefore could not have been influenced thereby;

"3. That the Master's firm was discharged by said Pacific Greyhound Lines, Inc. more than seven months before the Master's report was filed;

"4. That no officer, employe, or representative of the Southern Pacific Company had anything to do with the original employment of the Master's firm, which represented the Pacific Greyhound Lines, Inc. for several months and some of its constituent lines for five years before the Master entered it; or with the entry of the Master into said firm or its subsequent discharge;

"5. That no disqualification under any statute or any rule of court, nor any actual bias is charged by defendant against the Master as a ground of the motion to suppress; and

"6. Defendant has charged no unfairness in the Master's conduct of the hearing before him or in the admission or rejection of testimony, and requested in his brief on motion to suppress that this court give the evidence reported by the Master its own independent consideration and analysis and thereby arrive at its own findings of fact and conclusions of law."

2. The District Court made and on March 8, 1933 entered of record, findings of fact and conclusions of law, preceded by (Return, 49-88) the following:

> "After consideration of said argument (of plaintiff's counsel) and of the briefs on the merits filed by the respective parties, and from an examination of all the evidence, but without treating the Master's report as presumptively correct and entirely independent of said Master's report, the Court found and hereby pursuant to Equity Rule 70½, finds the facts specially in the above entitled cases as follows:"

3. The District Court made and on March 8, 1933 entered a final decree in each case permanently enjoining the enforcement of the Arizona Train Limit Law, and adjudging it invalid for the following reasons: (Return 89)

> "*First*, it invades the exclusive legislative field of Congress as limited by the Commerce Clause (Paragraph 3 of Section 8, Art. I) of the Constitution of the United States; *second*, it is in conflict with the train supply or train service clauses of the Car Service provisions (paragraphs 10 to 17, inclusive, and paragraph 21) of the Interstate Commerce Act; *third*, it is in conflict with and amounts to an unlawful attempt to supplement the Federal Boiler Inspection Act, as amended, the Power Brake provisions of the Federal Safety Appliance Acts and Section 26 of the Interstate Commerce Act, which operate upon the subject and are directed to the same object as the said Train Limit Law, and by which Congress completely and exclusively occupied the train length field; *fourth*, because it substantially and unreasonably impairs the carrier's facilities; *fifth*, because it is an undue and unreasonable

burden upon and direct interference with interstate commerce, in violation of said commerce clause; and *sixth*, because it is so unreasonable as to deprive plaintiff of its property without due process of law, in violation of the due process clause of Section One of the Fourteenth Amendment to the Constitution of the United States."

4. Upon receipt of the order of this Court entered in connection with the order to show cause herein, the District Court continued its term and stayed the injunction, pending the determination of this application in this Court. (Return, par. 13, p. 10).

History of the 1899 and 1925 Federal Substitution Statutes.

The history of the 1899 act is described in *Irwin v. Wright*, 258 U. S. 219 as follows:

> "A suit to enjoin a public officer from enforcing a statute is personal and in the absence of statutory provision for continuing it against his successor, abates upon his death or retirement from office. *Pullman Co. v. Croom*, 231 U. S. 571. In *U. S. ex rel. Bernardin v. Butterworth*, 169 U. S. 600, substitution was refused, although consent was given by the successor in office. This court said (p. 605):
>
> > 'In view of the inconvenience, of which the present case is a striking instance, occasioned by this state of the law, it would seem desirable that Congress should provide for the difficulty by enacting that, in the case of suits against the heads of departments abating by death or resignation, it should be lawful for the successor in office to be brought into the case by petition, or some other appropriate method.'

> "In response to the suggestion, Congress passed the Act of February 8, 1899, c. 121, 30 Stat. 822, under which successors of United States officers who have been sued may be substituted for them upon proper showing."

The *Wright* case, which was decided in 1922, was a suit against an Arizona state board and certain other officials to restrain the execution of the tax laws of Arizona which as applied by them were alleged to be in conflict with the federal constitution. This Court held that the suit could proceed as against the board, but must be dismissed as against the officials because their term of office had expired, and that their successors, who had consented to be substituted as defendants, could not be so substituted because no state or federal statute provided for such substitution; but the Court said:

> "It may not be improper to say that it would promote justice if Congress were to enlarge the scope of the Act of February 8, 1889, so as to permit the substitution of successors for state officers suing or sued in the federal courts, who cease to be officers by retirement or death, upon a sufficient showing in proper cases. Under the present state of the law, an important litigation may be begun and carried through to this court after much effort and expense, only to end in dismissal because, in the necessary time consumed in reaching here, state officials, parties to the action, have retired from office. It is a defect which only legislation can cure."

At the request of the members of the Judiciary Committees of the Sixty-eighth Congress, a committee of justices of this Court prepared a bill which was introduced as S. 2060 and H. R. 8206. This bill with

slight amendments was passed and became the Act of February 13, 1925 (c. 229, 43 Stat. 941). Section 11 of that bill, which was not amended, is the Substitution statute, (Sec. 780, Title 28, U. S. C.), and is as follows:

> "Sec. 11. (a) Where, during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States, or of the District of Columbia, or the Canal Zone, or of a Territory or an insular possession of the United States or of a county, city, or other governmental agency of such Territory or insular possession, and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved.
>
> "(b) Similar proceedings may be had and taken where an action, suit, or proceeding brought by or against an officer of a State, or of a county, city, or other governmental agency of a State, is pending in a court of the United States at the time of the officer's death or separation from the office.
>
> "(c) Before a substitution under this section is made, the party or officer to be affected, unless expressly consenting thereto, must be given rea-

sonable notice of the application therefor and accorded an opportunity to present any objection which he may have."

Paragraphs (a) and (b) of that section were explained in an analysis of the bill prepared by the committee of justices of this Court and printed for the use of the Senate Committee on the Judiciary, as follows:

> "The authority now given by the act of February 8, 1899, (30 Stat. 822), to substitute for the head of any department or bureau or other officer of the United States his successor in office where, during the pendency of any suit by or against such officer, the latter dies, resigns, or otherwise vacates his office, is extended by paragraph (a) so as to apply to any officer of the District of Columbia, of the Canal Zone, of a territory or insular possession of the United States, or of a county, city, or other governmental agency of such territory or insular possession; and a similar substitution is authorized by paragraph (b) in suits by or against an officer of a State, or of a county, city or other governmental agency of a State, pending in a court of the United States at the time of such officer's death or separation from the office."

With reference to paragraph (c), that committee said:

> "Paragraph (c) adds a new feature by requiring that notice of the application for such substitution and an opportunity to be heard in objection thereto shall be given the incumbent of the office, unless he has expressly consented to the substitution. The period of twelve months from the vacation of the office, allowed for such substitution under the existing law, is shortened in the bill to six months, which affords ample time for the purpose."

And the following general comments with reference to the entire section were made (Italics ours):

> "*The provision for substitution applies only to suits relating to the present or future discharge by the officer of his official duties.* Such suits, unless falling within the limited class defined in the act of 1899, must in many instances be dismissed, sometimes after reaching the Supreme Court, because of the expiration of the term for which the officer was elected or appointed, or of his otherwise vacating the office. Where the officer's term is for one or even two years, it is practically impossible, within that period, for him or one suing him in his official capacity, to prosecute a suit involving the assertion of a Federal right to the exhaustion of appellate review. The Supreme Court is, in consequence, debarred from passing on many important Federal claims which in other cases would come before it and be disposed of in ordinary course. Adequate relief against this inequitable situation will, it is believed, be afforded litigants in such cases by the provisions of this section. *It will be noted, however, that the provision for substitution is not mandatory, but leaves it to the sound discretion of the court to determine whether there is a substantial need for continuing the cause and obtaining an adjudication of the questions involved. This will tend to restrict the exercise of the right to cases which have a sound basis.*"

On February 2, 1924, Justices Van Devanter, McReynolds, and Sutherland appeared before a sub-committee of the Senate Committee on the Judiciary and discussed the bill. With regard to Section 11 Mr. Justice Van Devanter said:

> "There is now a statute of the United States prescribing that when a suit is brought in a Fed-

eral court against a Cabinet or other officer of the United States and he goes out of office, by death, resignation, or otherwise, his successor in office may be substituted in his place in order that the suit may proceed; but the statute does not cover suits against territorial, insular, State or county officers. *Section 11 of the bill enlarges the existing section so as to cover all of these, but it requires that notice be given to the successor and that he be given opportunity to show cause, if he have any, why the substitution should not be made.*"

The quotations made above from the analysis by the Committee of Justices of the Substitution statute and the statement of Justice Van Devanter appear at pages 16 and 42 of the record* of the subcommittee hearing.

In H. Rept. 1075, Sixty-eighth Congress, p. 7, the Judiciary Committee after stating that the successors of federal officers could be substituted under the 1899 statute but that no provision had been made for substitution of state officers, said:

"This is a great injustice, because one may begin a suit in a district court of the United States against officers of a State, county, or city, or such officers may bring a suit therein, and not reach the Supreme Court for review before their successors have been elected. Now, no substitution can be made, the case abates, and the action goes for nothing. *Under this provision, the new State, county, and city officers may be substitu-*

*Procedure in Federal Courts—Hearing before a Subcommittee of the Committee on the Judiciary, United States Senate, 68th Congress, First Session, on S. 2060, A Bill to Amend the Judicial Code, and S. 2061, A Bill to Give the Supreme Court Authority to Make and publish Rules in Common Law Actions—February 2, 1924.

ted after notice to them and if such substitution is shown not to work them injustice."

SUMMARY OF ARGUMENT

1. Unless, after an examination of the petition and return, this Court feels impelled to say the District Court proceeded "clearly without jurisdiction," the motion for leave to file the petition should be denied. *In re C. R. I. & P. Ry. Co.*, 255 U. S. 273.

2. Unquestionably, the Substitution statute vested discretionary power in the District Court to make the substitution order, and unless the Substitution statute is invalid, the order was proper. Petitioner's contention that the substitution statute was merely designed to permit substitution by *consent* in the case of State officials sued in their official capacity and as representatives of the State does violence to paragraph (c); furthermore, such a construction would render it meaningless. No statute is or ever was necessary to permit the successors of public officials to be substituted either with or without their consent when they were sued in their official capacity and as representatives of the State, which, of course, could be done only with the express or implied consent of the State.

3. The Substitution statute as applied by the District Court to the cases here involved does not violate the Fifth, Tenth or Eleventh Amendment. Congress has power by appropriate legislation to prevent the invasion by states of the exclusive and occupied legislative field of congress under the Commerce clause, and to prevent interstate commerce being unduly burdend and to enforce the Fourteenth Amendment. A case or controversy upon which the judicial power of

the United States may be asserted must be one in which each party has an interest in the subject matter and in which there are opposing interests. But in such a suit, failure of the defendant to conduct an active defense is no bar to the exercise of the judicial power of the United States. Petitioner in effect defaulted upon the entry of the Substitution order, but that no more affected the judicial power of the District Court to adjudicate the controversy than its power would have been affected had the original defendant not appeared in response to the original subpoena.

The Substitution statute is merely an improved method of procedure to fill a need so urgent that this Court called it to the attention of Congress. While, of course, no method of procedure can be adopted that will deprive a litigant of property without due process of law, nevertheless no litigant has any vested right in the method or forms of procedure which existed in 1789. If a substituted—or for that matter an original—defendant fails to appear in response to legal notice in a case of this kind, he might be subject to criticism for not making any defense; but he has no constitutional right to be immune from criticism and he is deprived of no property when enjoined from enforcing an unconstitutional statute.

Neither state nor federal substitution statutes, nor other state and federal laws, *compel* a defendant in a case such as this to conduct an active defense and assume personal liability for costs. Their plain meaning is that if the federal or state government furnishes funds or indemnity, then he should defend. But unless he is supplied with funds or indemnified

he need not do so. Liability for costs may become very great. Thus in *Newton, Atty.-Gen. et al v. Consolidated Gas Co.*, 265 U. S. 78, the gas company was allowed, as costs, surety bond premiums amounting to over $76,000. But no such liability was incurred by petitioner in this case because the final decree absolved him from all liability for costs up to and including the entry thereof. Costs in federal equity cases do not follow the judgment but are within the sound discretion of the court. *Dubois v. Kirk*, 158 U. S. 58, 67.

4. The Arizona constitution requires the attorney-general to perform such duties as are prescribed by law, which, of course, means by the legislature. He has a general duty to enforce all the laws and the Train Limit statute contains a specific command to him to prosecute all violations. His hands cannot be stayed by injunction in the state courts. In 1931, after much of the evidence had been taken, the legislature of Arizona passed what we refer to as the Arizona Train Limit Defense statute (p. 8, *supra)* which appropriated the sum of $20,000.00 to defend the rights and interests of the State in said suit. The act was an emergency measure "to provide an appropriation for the support and maintenance of a department of the State." Thereafter, in connection with a continuance requested by counsel for the original defendant, a written stipulation was entered into signed by him and by an assistant and a special assistant attorney general, that the case might be heard at any time thereafter that might be fixed by the Court. The final hearing was set for February 8, 1933, for the accommodation of the defendant's counsel, pursuant to

that stipulation which was signed by the original defendant and by the state officials in their respective official capacities and not as individuals or as solicitors for defendant. Said Arizona Train Limit Defense statute, therefore, amounted in effect to an appearance by the State in the suit. Certainly equity and good conscience will not permit a State to appropriate money and direct its officials to defend and delay a suit and then say it has no connection therewith. The acts of the attorney general and the assistant and special assistant attorney-general, in signing that stipulation, became the acts of the State and are binding upon the petitioner herein, who is required by the mandate of the Train Limit Defense statute to continue the defense and whose costs and expense, incurred in federal court cases, are by general law specifically made a charge against the State.

5. Consideration in a mandamus proceeding of the ruling of the District Court on the motion to dismiss the bills—denied over two years ago—and the motion to vacate the order of reference—denied about two years ago—is barred by *laches;* and the ruling on the motion to suppress cannot be reviewed in the absence of the record made thereon, which is not before this Court in the form required by Equity Rule 75, or otherwise. In re C. R. I. & P. Ry Co. 255 U. S. 273, *supra.* Furthermore, the rulings of the District Court, denying those motions, were proper.

6. The acts and proceedings of the District Court subsequent to the Substitution order were all within its jurisdiction.

ARGUMENT

I.

As to Jurisdiction

Petitioner's motion brief and his petition refer to so many matters that it is difficult to determine what he expects this Court to consider and pass upon in this proceeding. On page 5 of his motion brief he says he has no remedy by appeal. But before the petition was filed a final decree had been entered, from which he could then have taken and can now take an appeal as provided by Section 266 of the Judicial Code (Sec. 380, Title 28, U. S. C.). On such appeal every ruling of the District Court to which he excepted, including all those with respect to substitution, would be reviewed by this Court; and under Equity Rule 75 only the portions of the record below "essential to the decision of the questions presented by the appeal" would be required to be included in the appellate record.

Furthermore, there is no reason why, instead of walking out of the court room as soon as his objections to the substitution order and his motion to dismiss had been overruled and his exceptions taken, he should not have remained and participated in the final hearing, as he stated to the court he came to San Francisco prepared to do. (Return, p. 8). He would not thereby have consented to the substitution, or added in the least to the power and jurisdiction of the District Court over him. For, as said in *Harkness v. Hyde*, 98 U. S. 476, 479:

> "Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregu-

larity; nor is the objection waived when being urged it is overruled, and the defendant is thereby compelled to answer. He is not considered as abandoning his objection because he does not submit to further proceedings without contestation. It is only where he pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived."

Southern Pacific Co. v. Denton, 146 U. S. 202, 206.

Merchant's &c. Co. v. Clow & Sons, 204 U. S. 286, 289.

In re C. R. I. & P. Ry. Co., 255 U. S. 273, was an application for writ of prohibition and/or mandamus to be directed to an Ohio District Judge, wherein the petitioner claimed it had not become a party to a certain suit, had not been served with process, and could not (under Section 51 of the Judicial Code) be made a party without its consent. In refusing to issue the writ, the Court (p. 275) set forth the following general principles applicable to mandamus proceedings:

"There is a well-settled rule by which this court is guided upon applications for a writ of prohibition to prevent a lower court from wrongfully assuming jurisdiction of a party, of a cause, or of some collateral matter arising therein. If the lower court is clearly without jurisdiction, the writ will ordinarily be granted to one who at the outset objected to the jurisdiction, has preserved his rights by appropriate procedure and has no other remedy. Ex Parte Rice, 155 U. S. 396. If, however, the jurisdiction of the lower court is doubtful (In re Muir, 254 U. S. 522, decided by this court January 17, 1921), or if the jurisdiction depends upon a finding of fact made upon

> evidence which is not in the record (In re Cooper, 143 U. S. 472) or if the complaining party has an adequate remedy by appeal or otherwise (Ex parte Tiffany, 252 U. S. 32; Ex parte Harding, 219 U. S. 363) the writ will ordinarily be denied."

This Court then stated that "the most that can be said against the District Court's jurisdiction is that it is in doubt," and refused to pass upon the jurisdictional question at all, but dismissed the petition with the statement that the Rock Island "will have its remedy by appeal, unless it has failed to preserve by appropriate procedure that right of review."

Unless after an examination of the petition and return this Court feels impelled to say, as it did *In re New York*, 256 U. S. 490, 503, that "the want of authority in the District Court" to enter the substitution order of February 8, 1933, and—five days before the petition herein—the final decrees of March 8, 1933, "is so clear" that the cases should not run their orderly course on appeal from those decrees, it would, we respectfully suggest, be entirely consistent with the former decisions of this court to decline, on this application, to consider the jurisdiction of the District Court.

But we shall discuss that question of the District Court's jurisdiction as one upon which the Court may see fit to pass in the instant hearing.

As to the other issues raised by petitioner it would be wholly inconsistent with the practice of this Court for it to exert its jurisdiction to review the action of the District Court in overruling, in July, 1930, the motion to dismiss the bills of complaint; or

the refusal, in July, 1930, of the District Court to hear the evidence itself instead of referring the cases to a Master who completed the taking of evidence in April, 1931—about two years ago; or the order (Ex. G, Return, p. 27) overruling the motion of petitioner's predecessor to suppress the Master's report, after considering the extensive record made thereon, which is not presented by petitioner to this Court in the form required by Equity Rule 75 or otherwise.

The authorities thereon will be briefly referred to later in this brief, where the propriety of those rulings of the District Court also will be shown.

II.

UNQUESTIONABLY THE SUBSTITUTION STATUTE VESTED DISCRETIONARY POWER IN THE DISTRICT COURT TO MAKE THE SUBSTITUTION ORDER AND UNLESS THE STATUTE IS INVALID THE ORDER WAS PROPER.

Petitioner, on page 4 of the brief filed with his motion, contends the Substitution statute only *permits* a state officer to *consent* to substitution, when sued in his official capacity. Elsewhere in his brief petitioner states that such a suit is a suit against a state and is a suit prohibited by the Eleventh Amendment unless the state consents. His contention therefore seems to be that in a suit brought by or against a state officer, as a representative and on behalf of the state, and pursuant to a command by or with the consent of the state, a statute was necessary to permit substitution of a successor in a suit so brought or defended; and that Congress, by extending (in 1925) the ~~1919~~ 1899 federal officer Substitution statute to include state officers, supplied that need.

In 1 C. J., page 146, it is said:

> "An action by or against a public officer is not abated by a change in the incumbency of the office pending the action, if the action is in its nature by or against the office, unless there is a statutory provision to that effect. Nor does an action by or against a public board or commission abate on a change in its membership. But if the delinquency of a public officer is personal and does not involve any charge against the office itself the rule is otherwise."

The qualification at the end of the first sentence of the quotation refers to the Rhode Island statute providing for abatement unless substitution is made within one year.* No

*And in *Payne v. Stevens*, 260 U. S. 705 (1923) this Court held that actions brought by consent of the United States against the Director General of Railroads in his official capacity abated unless substitution was made within one year as required by the Substitution Act of 1899. See the interesting note 53, page 271, of Mr. Felix Frankfurter's work on "The Business of the Supreme Court."

[illegible] that the federal Substitution statute was not extended in 1925 to include state officers for the purpose of *permitting* substitution in suits by or against a state.

Petitioner's contention that the statute only empowers a court to *permit* and does not authorize a court to *compel* substitution does violence to the words of the statute. Paragraph (c) plainly contemplates substitution without consent and over objection. It is unambiguous and needs no construction. If any explanation of legislative intent were necessary then the statement of Mr. Justice Van Devanter, *supra*,

that a successor sought to be substituted is "given opportunity to show cause, if he have any, why the substitution should not be made," and the statement in the House Judiciary Report, *supra*, that under the statute "new State, county, and city officers may be substituted after notice to them and if such substitution is shown not to work them injustice," conclusively negative petitioner's contention.

On page 15 of his motion brief petitioner also says, "It has been held the statute does not authorize the court to compel a federal officer to accept substitution where he is sued personally and not in his official capacity"; and in support of that statement he cites *Union Trust Co. v. Wardell*, 258 U. S. 537. That was a suit against an internal revenue collector to recover the amount of a tax alleged to have been illegally collected by him, wherein upon the expiration of his term of office his successor was sought to be substituted.

Obviously both the 1899 federal officer Substitution statute and the 1925 federal and state officer Substitution statute were intended to apply only to suits which abated upon the retirement of the original defendant from office; otherwise the statutes were unnecessary. Suits against an internal revenue collector to recover taxes illegally collected by him did not, prior to the enactment of either of those statutes, so abate but such causes of action survived not only the expiration of his term of office but his death, and under Section 778, Title 28, U. S. C., the heirs or personal representatives could be substituted as defendants in any such suit.

Prior to the passage of the act of March 3, 1839

(c. 82, sec. 2, 5 Stat. 348) collectors retained custody of all customs and taxes of an unascertained amount or character or which were paid under protest as to rate or amount. By that statute they were required to pay all such moneys into the treasury of the United States; and by Section 2 thereof it was provided that if it should be shown to the satisfaction of the Secretary of the Treasury that any person had paid under protest more than the law required, it should be the duty of the treasurer to make refund. In 1845 it was held in *Cary v. Curtis*, 3 Howard 235, that because of the latter provision suits against the collector for the return of such duties so received by him could not be maintained. Congress promptly passed the act approved February 26, 1845, providing that nothing in the second section of the act of 1839 should take away or impair the right to maintain an action at law against the collector.

Another reason why the 1925 Substitution act here considered could not apply to a suit against a collector is that it only applies to a suit "relating to the *present or future* discharge of his official duties." An action against an internal revenue collector relates to what he has done in the past; in its essence it is an action for money had and received. This Court did not hold in the *Wardell* case and has not held in any other case that a federal officer cannot be substituted, either with or without his consent, in a suit relating to the *present or future* discharge of his official duties.

Petitioner does not here claim he showed to the District Court any valid cause why he should not have been substituted. As stated above he claims in para-

graph 18 of his petition (p. 15) that the action of the court (a) in overruling his predecessor's motion to dismiss the bill of complaint, (b) in granting plaintiff's motion to refer the cases to a master, and (c) in failing to overrule his predecessor's motion to suppress the master's report, are reasons justifying his refusal to consent to substitution. But he does not claim that constituted such a showing of cause why the substitution order should not be made that the court had no discretion to make it; and any such claim would be wholly improper here for the question of whether good cause for or against substitution is shown in a given case clearly is not a question reviewable by mandamus. Because of the nature of the allegations made with respect to the order of reference and the motion to suppress the Master's report we hereinafter discuss them although they are wholly irrelevant.

But at this point we shall now proceed to consider the real question before this court, which is the validity of the 1925 substitution statute *as applied to the cases here involved.*

III.

THE SUBSTITUTION STATUTE AS APPLIED BY THE DISTRICT COURT TO THE CASES HERE INVOLVED DOES NOT VIOLATE THE FIFTH, TENTH OR ELEVENTH AMENDMENT. CONGRESS HAS POWER BY APPROPRIATE LEGISLATION TO PREVENT THE INVASION BY STATES OF THE EXCLUSIVE AND OCCUPIED LEGISLATIVE FIELD OF CONGRESS UNDER THE COMMERCE CLAUSE, AND TO PREVENT INTERSTATE COMMERCE BEING UNDULY BURDENED, AND TO ENFORCE THE FOURTEENTH AMENDMENT.

Nature of Actions Relating to the Present or Future Discharge of the Duties of State Officials.

Petitioner in his brief filed with his motion seems to be confused as to the nature of actions brought against a state official which relate to the present or future discharge of his official duties; apparently he fails to comprehend the difference between a personal action against a private individual and a personal action against a state officer. At common law a "personal action" against a private individual was one which abated upon his death and not before; and many actions so abated. But because an action against an individual who is a state officer and which relates to the present or future discharge of his official duties can be maintained only so long as he is clothed with official authority to do the act sought to be enjoined, it abates as soon as he ceases to hold such office, unless there is a statute providing for the substitution of his successor. That is the obvious and necessary purpose of the Substitution statute. Such a defendant is not, because of that situation, sued in his official capacity or as a representative or agent of the state within the Eleventh Amendment cases. Nor are the principles applicable that govern abatement of actions against individuals such as an action to enjoin a threatened trespass tortious in character, personal in nature and not commanded by a state statute which authorizes and requires the trespass.

By statute many actions against private individuals have been made to survive and may be continued by or against their heirs or personal representatives. The ordinary statute permitting substitution fastens liability upon the property of the original defendant

which comes into the hands of the subsequent defendant. It in effect provides that there shall be no succession of property rights unless and until debts charged against such property are satisfied.

Obviously the federal Substitution statute here involved is based on no such premise. Its plain purpose is, among other things, to provide a method of procedure whereby constitutional questions may be adjudicated in the federal courts in suits such as those here involved, against officials and which relate to the *present or future discharge of their duties;* another purpose is to enable the successors of the state officials against whom final decrees have been entered during their term of office by district courts, to be substituted and take or carry on appeals.

While Judicial Power Can Only Be Exercised in a Case or Controversy, Its Exercise Is Not Confined to the Forms of Procedure That Existed in 1789.

It is elementary that the judicial power of the United States can only be exerted in "cases" or "controversies" between parties having opposing interests. Thus in *Muskrat v. United States*, 219 U. S. 346, it appeared that Congress had passed an act authorizing the plaintiff to bring in the Court of Claims a suit against the United States to test the validity of certain Indian legislation, and further providing that the expenses of the plaintiff were to be paid out of the United States Treasury. This Court held it was created by the Constitution and by that instrument endowed with judicial power which did not include the review of cases in which there were no adverse litigants. That situation does not obtain here, for

plaintiffs must bear their own expenses and those of defendant are provided for by the Arizona Train Limit Defense statute, *supra*.

On Page 26 of his motion brief, defendant quotes from *Liberty Warehouse Co. v. Grannis*, 273 U. S. 70, in part as follows (italics supplied):

> "It is not open to question that the judicial power vested by article 3 of the Constitution in this Court and the inferior courts of the United States established by Congress thereunder, extends only to 'cases' and 'controversies' in which the claims of litigants are brought before them for determination by such regular proceedings as are established for the protection and enforcement of rights, or the prevention, redress, or punishment of wrongs; and that their jurisdiction is limited to cases and controversies presented in such form with *adverse litigants*, that the judicial power is capable of acting upon them, and pronouncing and carrying into effect a judgment between the parties."

Because a state, unless it consents, cannot be sued, this Court has always recognized that an officer charged with enforcement of a statute has sufficient interest in upholding its constitutionality so that he is a proper adverse litigant in a suit whose real object is to have the statute adjudged void. But a state officer can not refuse to enforce a statute and then contend in the federal courts that his refusal was justified because the statute was void, unless he can show that if he enforces it and if it be unconstitutional he will be deprived of property. For as said in *C. & G. Ry. Co. v. Miller*, 283 U. S. 96, 99, where an officer who stood to lose nothing by enforcing a statute attempted to claim it was void:

> "The protection of the Fourteenth Amendment against state action is only for the benefit of those who are injured through the invasions of personal or property rights or through the discriminations which the Amendment forbids. The constitutional guaranty does not extend to the mere interest of an official, as such, who has not been deprived of his property without due process of law or denied the equal protection of the laws."

The reason for this rule, of course, is that it is the duty of state officers to enforce or defend statutes unless and until they are adjudged void, and for that purpose they may properly appear either as plaintiffs or defendants; but if they were allowed to assert that a statute they are required to enforce is unconstitutional, constitutional questions would be decided in cases in which there was no real defense. For example, if the Attorney General of Arizona should refuse to enforce the Train Limit law and a mandamus proceeding should be brought against him by the trainmen, in which the Attorney General should assert that the law is invalid, the suit would be a suit on one side of which would be those who were interested in sustaining and upholding the validity of the statute and on the other side a party whose duty it was to uphold it. That would not be in contemplation of law an adversary proceeding.

In the quotation from *Liberty Warehouse Co. v. Grannis, supra*, the statement is made that cases and controversies must be determined by "regular proceedings." But by that this Court did not mean to say that the proceedings must be such as those which existed in England at and prior to the adoption of the

Constitution, for as said in *Twining v. New Jersey*, 211 U. S. 101:

> "It does not follow, however, that a procedure settled in English law at the time of the emigration and brought to this country and practised by our ancestors is an essential element of due process of law. If that were so, the procedure of the first half of the seventeenth century would be fastened upon the American jurisprudence like a strait-jacket, only to be unloosed by constitutional amendments."

And in *N. C. & St. L. Ry. v. Wallace, et al*, (53 S. Ct. Reptr. 345) decided February 6, 1933, the Court expressed the same thought in the following language:

> "The Constitution does not require that the case or controversy should be presented by traditional forms of procedure, invoking only traditional remedies. The judiciary clause of the Constitution defined and limited judicial power, not the particular method by which that power might be invoked. It did not crystalize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts."

The *Wallace* case, *supra*, is interesting in many ways. For example, the Commissioner of Finance and Taxation of the State of Tennessee, was a defendant. He resigned, and on October 10, 1932 this Court substituted his successor, and again on January 23, 1933 substituted a second successor. The Attorney General of Tennessee was also a party to this suit and his successor was substituted by order of this Court entered December 12, 1932.

That case is further interesting in that the Court there took jurisdiction of and passed upon the validity of a Tennessee taxing statute which had been considered by the courts of Tennessee under the Declaratory Judgment act of that state in a proceeding which this Court described as follows:

> "Appellant filed its bill of complaint in the state Chancery Court, joining as defendants the appellees, the Attorney General and the state officials charged with the duty of collecting the gasoline privilege tax imposed by the Tennessee statute. The complaint alleged that appellant is engaged in purchasing gasoline outside the state, which it stores within the state pending its use within and without the state in the conduct of appellant's business as an interstate rail carrier; that appellees assert that the statute taxes the privilege of storing gasoline within the state and is applicable to appellant; that they have demanded payment of the tax in a specified amount and have determined to enforce their demand and that, under the circumstances alleged, the statute as applied to appellant is invalid under the commerce clause and the Fourteenth Amendment. The relief prayed was that the taxing act be declared unconstitutional as applied to appellant. The Chancery Court sustained the appellees' demurrer to the sufficiency in law of the allegations relied on to establish the unconstitutionality of the tax. Its final decree dismissing the bill on the merits has been affirmed by the highest court of the state."

The effect of that decision is that if there is a real adversary proceeding, then this Court has the power to pass upon the constitutionality of the law involved, even though the only judgment entered is one either upholding the law involved or declaring it unconstitu-

tional; that it is unnecessary that the state officials be restrained from enforcing the law.

Congress, by the extension of the Substitution statute to include state officers, clearly has provided that when they are substituted the validity under the federal constitution of any state statute involved in the proceedings may be determined by the District Court in the first instance subject to review by the federal appellate courts, and has given power to effect such substitution in important cases.

Congress is Authorized by Appropriate Legislation to Enforce the Fourteenth Amendment and to carry into Effect the Power to Regulate Interstate Commerce. The Substitution Statute is a Valid Exercise of That Power.

The Train Limit cases involve questions arising under the Fourteenth Amendment and the Commerce Clause.

Section 5 of the Fourteenth Amendment empowers Congress "to enforce, by appropriate legislation" the provisions thereof. In the *Civil Rights Cases*, 109 U. S. 3, 13, the Supreme Court, with reference to this provision, said:

> "Until some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity: for the prohibitions, of the amendment are against State laws and acts done under State authority. Of course,

> legislation may, and should be, provided in advance to meet the exigency when it arises; but it should be adapted to the mischief and wrong which the amendment was intended to provide against; and that is, State laws, or State action of some kind, adverse to the rights of the citizen secured by the amendment."

It seems clear that the 1925 Substitution statute taken in connection with other provisions of the federal statutes with regard to such suits is, among other things, legislation provided in advance to meet the exigency of Fourteenth Amendment violation when it arises.

By Section 8 of Article I of the Constitution, Congress is given various specific powers, including the power to regulate interstate commerce, and also is vested with power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States."

With respect to the powers of Congress, this Court, in the case of *In re Quarles*, 158 U. S. 532, 535, said:

> "Every right, created by, arising under, or dependent upon the Constitution, may be protected and enforced by such means and in such manner as Congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may in its discretion deem most eligible and best adapted to attain the object."

It cannot therefore be denied that Congress has legislative power to prevent the State of Arizona from invading the exclusive and occupied field of Congress

and from unduly burdening interstate commerce and depriving plaintiffs of their property without due process of law as the District Court by its final decree has found that state has done by the Train Limit law.

But petitioner contends that the substitution statute as applied by the District Court in these cases offends against the Eleventh Amendment and the Fifth Amendment. In *Proutt v. Starr*, 188 U. S. 537, this Court said (p. 543):

> "The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity. It would, indeed, be most unfortunate if the immunity of the individual States from suits by citizens of other States, provided for in the Eleventh Amendment, were to be interpreted as nullifying those other provisions which confer power on Congress to regulate commerce among the several States . . . . . which would be nullified and made of no effect, if the judicial power of the United States could not be invoked to protect citizens affected by the passage of state laws disregarding these constitutional limitations. Much less can the Eleventh Amendment be successfully pleaded as an invincible barrier to judicial inquiry whether the salutary provisions of the Fourteenth Amendment have been disregarded by state enactments."

Petitioner's Eleventh Amendment contention, when analyzed, is a baseless technicality. The mere fact that because of the Eleventh Amendment the procedure heretofore approved by this Court, whereby in the absence of an adequate remedy at law the constitution-

ality of a state law may be passed upon in an equity suit against a state officer to restrain him from enforcing it, (if that suit is brought by a party who suffers property damage because of the law and a final decree is entered during such officer's term of office) surely does not mean this Court will refuse to approve the improved procedure provided for by Congress pursuant to the suggestion of this Court.

It is not a condition precedent to the exercise of the judicial power of federal courts that the defendant in any case or controversy shall actively defend the same. If he is an interested party that is sufficient and the questions involved may be adjudicated even if he defaults. Therefore, if petitioner's predecessor had failed to appear in the cases, the District Court nevertheless could have adjudicated the questions involved but could not have rendered a judgment against the defendant for costs in the event the decree ran against him.

But the original defendant did not default; he made an appearance and conducted an active and protracted defense, and by so doing became liable for such costs as the District Court in the exercise of a sound discretion might find should be assessed against him and which were incurred prior to the expiration of his term of office. However, the original defendant's appearance and subsequent defense was purely voluntary—at least until the passage of the Train Limit Defense statute of March 13, 1931 by the Arizona legislature, p. 8, *supra*. And unless said act of the Arizona legislature required petitioner to continue the defense of the suits begun by his predecessor, he was under no compulsion to appear before the Dis-

trict Court after having been served with notice of the application for substitution. But his failure to appear would no more have affected the power of the District Court to adjudicate the controversy than failure of his predecessor to appear in response to the original subpoena would have affected it.

If petitioner had appeared and continued the defense he might have incurred possible liability for costs, but since he appeared only for the purpose of objecting to the jurisdiction of the court, obviously he incurred no possible liability for costs. It could as reasonably be said that the Substitution statute, as applied by the District Court, required petitioner to institute this proceeding in this Court, where he could incur liability for costs, as to say it required him to incur liability for costs in the District Court. Costs in all cases result from the voluntary action of the parties. If plaintiffs do not bring suits, and if defendants do not defend suits or have not in advance by their conduct or agreements become liable for costs, no costs can be assessed against them.

But we repeat that the question of whether petitioner would have incurred possible liability for costs incurred either prior or subsequent to his substitution if, instead of objecting to the jurisdiction of the court or after objecting thereto and saving his exceptions, he had made an active defense, is not raised by the petition because instead of conducting an active defense in the District Court petitioner "withdrew from the court" (Pet. 12) and thereby absolved himself from all possibility of such liability. Neither the federal Substitution statute nor the substitution

order of the District Court contained any provisions with respect to costs; and it is with respect to that order and that statute that petitioner here complains. And under the facts shown both by the petition and the return, the question of petitioner's liability for costs incurred while his predecessor was the defendant of record is moot because the motion for leave to file petition was made on March 13, 1933, after the filing on March 8, 1933, of final decrees that adjudged that plaintiffs should collect no costs from either petitioner or his predecessor. (Decree, Exhibit J to Return, p. 92.)

It is true in some of the cases holding there could be no substitution without a statute providing therefor, lack of privity is referred to. However, what the Court held in those cases was that there could be no substitution without a statute. Since a statute has now been enacted those decisions have no application to the questions here involved.

Obviously what this court meant by lack of privity was that there was not such privity as exists for example between a trustee and his successor; that there was not such privity that the action would survive in the absence of a statute so providing. But, as stated by the District Court in its opinion (Return, 35):

> "The attorney general of Arizona holds office until his successor is duly elected and qualified. (Article 5, Section 1, Arizona Constitution; Section 56 Rev. Code of Ariz., 1928). The Arizona Statute involved herein imposes the duty of the attorney general of the state, and him alone, to enforce the Train Limit Law. It is a

> continuing statutory duty devolving upon each succeeding attorney general of the state. This duty is imposed upon Mr. LaPrade as it was upon Mr. Peterson and will continue to be inherited by each succeeding attorney general as long as the act remains upon the statute books of Arizona."

There is ample relationship between petitioner and his predecessor to sustain the substitution statute and the action of the District Court thereunder.

The Duty of the Petitioner is Precisely the Same as That of His Predecessor—to Enforce the Law Unless Competently Restrained. Neither Could Disclaim That Intention nor is a Threat by Either Necessary to the Jurisdiction.

Petitioner states on pages 25 and 26 of his motion brief, that

> "He is charged with no act or threat, no complaint is made against him. He is to be substituted in the year 1933 to answer for the alleged wrong of another in the year 1929, without opportunity to plead or present evidence."

That, in effect, is but to say that while the District Court may have had jurisdiction of Peterson it may not have jurisdiction of petitioner unless after a new pleading and additional proof such jurisdiction is made to appear.

The jurisdiction over Peterson was grounded on his occupancy of a constitutional office, the incumbent of which had the duty under the laws of Arizona both

generally* and specially under the Train Limit law to bring penalty suits under that law; that the Attorney General was the only official who could enforce that law and that the law imposed a continuing duty of enforcement on the individual who occupied the office.

The bills, after describing the defendant's official capacity, charge (Return, pp. 47, 76) that the defendant has the duty of prosecution and that if the law is disobeyed he will prosecute.

There is no question of statutory construction involved. The case is not that of a state official placing a federally unconstitutional interpretation upon an otherwise valid statute and threatening to act accordingly. Where the state statute is plain, mandatory, and admits of but one construction as to the duties of the officer, and the penalties are such that the person against whom it is directed cannot prudently disobey it, it is clear that if no injunctive relief could be sought against him unless and until he made a formal threat of prosecution it might never be possible to enjoin, and irreparable injury might continue indefinitely.

Petitioner is in no different—no better—position than his predecessor in respect of his suability in the cases at bar. Therefore the substitution deprives him of no right of defense on that ground.

It is our view, and the District Court held, (43 Fed. (2d) on p. 200) that the true rule is that when

* Rev. Code Arizona, 1928, Sec. 52. "The attorney general shall perform (certain enumerated duties and) such other duties as may be required by law."

the official sued is under a statutory duty to prosecute, that is sufficient for jurisdiction. That rule is stated by Mr. Justice Van Devanter in *Pennsylvania v. West Virginia*, 262 U. S. 553, 592 (relied on by the District Court) as follows:

> "The second question is whether the suits were brought prematurely. They were brought a few days after the West Virginia act went into force. No order under it had been made by the Public Service Commission; nor had it been tested in actual practice. But this does not prove that the suits were premature. Of course they were not so, if it otherwise appeared that the act certainly would operate as the complainant States apprehended it would. One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough . . . This (Section 1) is a substantive provision whose terms are both direct and certain, and to which immediate obedience is commanded. No order of the commission is required to give it precision or make it obligatory, *and it leaves nothing to the discretion of those who are to enforce it. On the contrary, it prescribes a definite rule of conduct and in itself puts the rule in force.*"

Even the proclamation of a statute may be enjoined. *Pierce v. Society of Sisters, etc.*, 268 U. S. 510.

And in *Williams v. Boynton*, 147 N. Y. 426; 42 N. E. 184, the Court of Appeals, with respect to the lack of necessity for threats in suits such as these, said:

> "The appellant contests the right of the plaintiff to maintain this action at all, because there is no evidence that the clerk had threatened to submit the question of removing the county seat to the electors. It needed no threat to establish

> the danger apprehended. The clerk, as a public officer, was required by law to make the submission upon the direction of the board of supervisors. That direction had been given. It was his official duty to obey it, and the presumption is that he was about to do so, and would do so unless restrained by the order of the court. The case was not one of a mere apprehension of some possible act, but of the performance of an official duty already commanded by an apparently competent authority, the regularity of which it was not his business to investigate. The act was much more certain to be done than one merely threatened by a person under no obligation at all."

Section 3 of the Arizona Act specifically provides that the penalties thereunder "shall be recovered and suits therefor brought by the Attorney General, or under his direction, in the name of the state." No discretion in the matter is entrusted to the Attorney General. In the language of the Supreme Court in the *West Virginia* case cited above, the Train Limit law "leaves nothing to the discretion of those who are to enforce it." It imposes a mandatory duty upon the Attorney General to "bring suits to recover all penalties."

Section 9, Article VI of the Arizona Constitution provides that the powers and duties of the Attorney General shall be "as prescribed by law"; Section 4396 of the 1928 Revised Statutes of Arizona provides for the issuance of a writ of mandamus to compel the performance of official duties; and Section 19 of the same Statutes also requires the Governor of Arizona to see that the duties of the executive officers are performed, or that such remedies as the law allows are applied.

No wrongful or unconstitutional act or intent can be imputed to the state, but the legislature and the attorney general are agents of the state and capable of unlawful action; and the latter is bound to obey the former.

The authorities almost unanimously hold that it is the duty of an executive officer to comply with a state statute until the courts declare it unconstitutional, unless he be under a personal liability if he complies and the statute is afterwards annulled; and that in the absence of personal liability, the defense of unconstitutionality may not be raised in a mandamus proceeding by any such officer. *State, ex rel. v. State Board*, 84 Fla. 592, 94 So. 681; *Harvard Law Review*, June, 1929, p. 1071.

If the Supreme Court of Arizona passed upon the validity, under the Constitution of the United States, of the Train Limit law, in mandamus against the Attorney General and upheld the statute, this Court would not consider the proceeding a case or controversy which it could review upon an appeal by the Attorney General because he would have merely an official and not a personal interest therein. *C. & G. Ry. Co. v. Miller*, 283 U. S. 96, 99, *supra.*

Of like authority are: *Smith v. Indiana*, 191 U. S. 138; *Braxton County Court v. West Virginia*, 208 U. S. 192; *Marshall v. Dye*, 231 U. S. 250, 258; and *Stewart v. Kansas City*, 239 U. S. 14, 15.

In the absence of an injunction restraining him the Attorney General of Arizona can incur no personal liability by suing for penalties arising from violations of the Train Limit law. The propriety of such suits

is, therefore, not left to his individual conscience. Nor could he foreclose mandamus proceedings by agreeing not to prosecute; no such promise would bind his successor. Moreover, public policy would forbid it.

The petitioner has no defense to jurisdiction over him that has not been urged by his predecessor, overruled by the District Court and now available to petitioner by direct appeal to this Court.

The District Court Had Jurisdiction of the Original Defendant.

Petitioner's confusion as to whether the suits here involved were against Peterson individually, or against him as Attorney General or violated the Eleventh Amendment merely beclouds the real issues on the pending application.

The suits were brought against "K. Berry Peterson, Attorney General of the State of Arizona" under the doctrine of this court illustrated by and expounded in *Ex parte Young*, 209 U. S. 123, which has been followed by it consistently to its latest decision thereon in *Sterling, Governor, v. Constantin*, 287 U. S. 378.

A penalty of from $100 to $1000 is provided for each offense and "such penalty *shall* be recovered and suits therefor brought by the Attorney General or under his direction." The courts of the state cannot stay his hand if they would.

> "An injunction cannot be granted * * * to prevent the execution of a public statute by officers of the law for the public benefit." (Rev. Code Arizona, 1928, Sec. 4281.)

Nor, as pointed out in *Ex parte Young, supra*, is

there an adequate remedy at law by a single disobedience followed by suit under the statute because the daily loss to the carrier would continue pending final determination of the state court suit and would be irreparable.

The Attorney General is the only state official charged with the duty of enforcing the law. His is a continuing duty devolving upon each individual who assumes that office. In *Ex parte Young, supra*, it was said with reference to the Attorney General there involved:

> "His power by virtue of his office sufficiently connected him with the duty of enforcement to make him a proper party to a suit of (this) nature."

But there is no need to rely on the general duties of the petitioner in this case. He is specially enjoined to enforce it.

The carrier need not defer its appeal to equity until it is sued or threatened with suit *(Penna. v. West Va.*, 262 U. S. 553, *supra)*.

The statute is a potent and continuing threat and the Attorney General the only instrumentality by which the threat can be carried out.

We refer to the discussion of the effect of the statute in the interlocutory opinion of the District Court at page 200 of 43 Fed. (2d) and in its opinion on final hearing filed March 8, 1933, (Exhibit H to Return, p. 35).

The District Court found no difficulty in conclud-

ing that it had jurisdiction of the parties and the subject matter and accordingly overruled the motions to dismiss by the opinion reported as *Southern Pacific Co. v. Peterson*, 43 Fed. (2d) 198.

The result was that each plaintiff had a suit pending against K. Berry Peterson, Attorney General of the State of Arizona that, under the doctrine of *Ex parte Young, supra*, could be brought against none other than the individual who occupied that office. To quote from the Substitution statute it was "a suit relating to the present or future discharge of his official duties" and—again to quote from that statute—after the suit had proceeded to the point where it was ripe for decision by the court of first instance and the original defendant ceased "to hold such office," there was clearly "a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved."

In *Nance v. People*, 25 Colo. 252, the Supreme Court of Colorado said:

> "The suit was commenced against the original respondent in his official capacity. The obligation which relator sought to enforce, if the allegations in the alternative writ were true, was a duty devolving upon no particular state treasurer, but was perpetual, upon the then incumbent of that office, and his successors, unless legally excused; and, consequently, the action would not abate by reason of the expiration of the term of office of the official against whom the action was originally commenced. Sec. 15, code. To hold otherwise would be a sacrifice of substance to mere form, result in a denial of justice, and might prevent actions of this character being disposed of upon their merits, because, in many in-

stances, before the cause was finally decided, the incumbents of the office would change, and with each change the relator would be compelled to commence his action de novo. People v. Collins, 19 Wend. 55; State v. Common Council, 15 Wis., 30; State v. Gates, 22 Wis. 210; Maddox v. Graham, 2 Met. (Ky.) 56; Pegrum v. Commissioners, 65 N. C. 114; State v. Warner, 55 Wis. 271. The action was commenced against the state treasurer officially, to compel him to perform an official act. It was not against the individual holding that office, *or one against him personally, except as a means to work out the redress to which relator claimed he was entitled.* His cause of action survived the change in the office of treasurer. Mulnix, at the time of the motion to substitute him as respondent, was the official against whom the action was pending. The official duties of his predecessor, except when legally excused, devolved upon him in the same capacity. If the peremptory writ issues in cases of this character, it must be directed to the official in office at the time it is ordered. It was, therefore, proper to substitute him in his official capacity as the respondent in the case. Lindsey v. Auditor, 3 Bush (Ky.) 231; People v. Reeder, 37 Mich. 351."

The Fifth Amendment is not Violated by the Substitution.

Petitioner LaPrade complains that his substitution infringes the Fifth Amendment in two respects which are, in substance, (a) that it may result in his being mulcted in costs and (b) that he is thereby deprived of a day in court and the right to choose his own counsel and tender his own witnesses.

(a) The petitioner says (Pet. Motion Brief, p. 22) that he—

> "must undertake the financial burden of carrying on a suit which, through its conduct by Peterson, carries with it *ultimate liability not only for the costs already incurred* but also liability for the costs which the new defendant must incur, or else fail in his defense."

His fears of financial loss were there expressed when he did not know what the District Court's decree would determine with respect to costs. When on March 7, 1933, he verified his proposed petition for mandamus the cases were under submission to the District Court in his name as substituted defendant. But on March 8, 1933, and before his counsel on March 13, 1933, presented that petition to this Court, the District Court filed its final decree in each case expressly absolving petitioner from any costs that had accrued to the time of entry of the decree (Decree, Ex. J, Return, p. 89). Thenceforth he can be in no worse position with respect to costs than any involuntary defendant to a bill in equity who may, at his option, default or go forward. Moreover, he is silent as to the fund created by the Arizona Train Limit Defense statute, supra, although as payments from that fund are within his control the balance therein is within his knowledge. For him to say he may be subjected to costs if he disobeys an injunction is merely to beg the question.

(b) Petitioner was given and still has his "day in court." In opposing the substitution petitioner did not ask permission to file amended or supplemental answers, or to reopen the causes for further

testimony. Nor did he request permission to appear *pro se* and argue the cases on the merits, or to be represented by counsel of his own selection other than those of record for the defendant. He appeared—specially—by the same counsel who had represented his predecessor from the inception of the litigation. They had theretofore appeared as state officials (Exs. to Return, pp. 21, 22). When they appeared for petitioner it may be significant that they did so merely as attorneys. But they came to the San Francisco hearing on the merits "physically prepared" and intending to argue the entire case (Return, p. 8). They then concluded to hazard the result by relying on the technicality on which they base this application. No request for further hearing or argument was made after the substitution was ordered from the bench at the conclusion of the oral argument on petitioner's objections.

If the Substitution statute applies to the instant cases it would apply by its express terms to them if they were pending in this Court. No new answers or additional evidence would here be permitted. In such circumstances the substituted defendant would take the cases as he found them, and their final result would perforce govern him "in the performance of future official duties."

In the instant cases petitioner made no effort other than to move that the cases be brought to a sudden end, because, as he says, his substitution offends the due process clause of the Fifth Amendment by depriving him of his day in court. We do not so view the procedure. The Substitution statute is intended to permit the final determination of cases of the very

class into which the instant cases fall. The petitioner today is in full possession of an unexpired right of direct appeal to this Court from the final decrees. (Sec. 380, Tit. 28, U. S. Code). On that appeal (Ex. I, Return, p. 49 *et seq.)* he may raise all of the points relied on in his petition and may have reviewed every other ruling properly excepted to, or appearing on the face of the record. He does not claim his predecessor waived any point, or failed to preserve all proper exceptions, or that the record does not present every available defense.

"Due process" under the Fifth Amendment is measured by precisely the same rules as obtain in due process cases under the Fourteenth Amendment *(Farrington* v. *Tokushige*, 273 U. S. 284).

Analogous to the instant case on the issue now discussed is, we respectfully submit, the recent (November 14, 1932) case of *American Surety Company* v. *Baldwin*, 287 U. S. 156, from which we now quote:

> "Third. The surety company contends in No. 21 that, even if the trial court of the state had jurisdiction, the federal District Court may enjoin the enforcement of the judgment on the ground that, having been entered without notice and an opportunity for a hearing on the construction of the bond, it lacked due process of law.
>
> It is true that entry of judgment without notice may be a denial of due process even where there is jurisdiction over the person and subject-matter. But that rule is not applicable here; for, if the bond properly construed stayed the judgment as against Anderson, the surety company consented to the entry of judgment against it without notice for his failure to pay.

If the bond did not stay the judgment as against Anderson, the trial court confessedly erred in entering the judgment on the bond. In order to contest its liability, the surety company had the constitutional right to be heard at some time on the construction of the bond. The state practice provided the opportunity for such a hearing by an appeal after the entry of judgment.

"The practice prescribed was constitutional. Due process requires that there be an opportunity to present every available defense; but it need not be before the entry of judgment. York v. Texas, 137 U. S. 15, 11 S. Ct. 9, 34 L. Ed. 604. Compare Grant Timber & Manufacturing Co. v. Gray, 236 U. S. 133, 35 S. Ct. 279, 59 L. Ed. 501, Bianchi v. Morales, 262 U. S. 170, 43 S. Ct. 526, 67 L. Ed. 928. See, also, Phillips, v. Commissioner, 283 U. S. 589, 596-597, 51 S. Ct. 608, 75 L. 1289; Coffin Brothers & Co. v. Bennett, 277 U. S. 29, 48 S. Ct. 422, 72 L. Ed. 768. An appeal on the record which included the bond afforded an adequate opportunity. Thus the entry of judgment was consistent with due process of law."

In *Phillips v. Commissioner*, 283 U. S. 589, referred to in the foregoing citation, it is said:

"Where only property rights are involved mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate."

The two cases last cited differ from the instant cases in that the judgments there entered without notice deprived the defendants of property, whereas in the Train Limit cases the substitution order was entered with notice and it deprived the defendant of no

property. On page 23 of his motion brief, petitioner intimates that if the substitution order be upheld he may be criticized for abandoning the case, but an attorney general has no constitutional right to be immune from criticism, and he loses no property when a statute he is required by law to enforce is adjudged unconstitutional. As shown under our Point IV, *infra*, the petitioner is not in the position of an ordinary "stranger to the litigation."

The Petitioner's Vague Claim of Some New Defense He Might Assert Is Here Made for the First Time, Is Too Indefinite To Be Considered and Is Groundless.

Petitioner complains (Pet. Motion Brief p. 23) that he "is given no opportunity to answer a complaint against *him*, no opportunity to move to dismiss (for example on the basis of an entirely new ground for dismissal, which has arisen since the suit was begun by the passage of a new law affecting present practice in the State of Arizona)."

He neither refers to nor quotes the "new law" and, we assume, because of Rule 27 the passing reference should be disregarded.

However we suppose that the reference is to Chapter 84, Arizona Statutes of 1931, approved March 17, 1931, which we print in the margin.*

* Section 1. Whenever any proceeding is begun in any court in this state for the purpose of enforcing any statute or administrative order of this state, and in defense thereto the contention is made that said statute or administrative order is unconstitutional and invalid the court in which such proceeding is begun may grant a stay of all other proceedings under such statute or order by any state officer or officers, pending the determination of this proceeding and such pro-

That statute, we take it, is designed to cover the provisions respecting a "stay of proceedings in the state court" referred to in the amendment to Sec. 266 Judicial Code (now Sec. 380, Title 28, U. S. C.) made by the Act of March 4, 1913 (C. 160, 37 Stat. 1013).

The Arizona stay-statute would not cover the instant suits even if they had been filed after its adoption.

(a) The Arizona Train Limit Law of 1912 was submitted by referendum petition to a vote of the electors; it was by them ratified on November 5, 1912. In 1914 the State Constitution was amended to provide that the power of the Legislature to repeal or amend should not extend to initiative or referendum measures approved by a majority vote of the qualified electors. Citing and discussing the constitutional provisions the Supreme Court of Arizona held in 1926 in *Willard* v. *Hubbs, State Auditor*, 248 Pacific Rep. 32,

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ceeding and any appeal therefrom shall be given precedence and in every way expedited, and shall be assigned for hearing at the earliest practicable day.

Section 2. Whenever a suit praying for an interlocutory injunction shall have been begun in a Federal District Court to restrain any official or officials of this state from enforcing or administering any statute or administrative order of this state, or to set aside or enjoin such statute or administrative order, any defendant in such suit, or the attorney general of the state, may bring a suit to enforce such statute or order in the superior court of the state at any time before the final hearing on the application for an injunction in the suit in the Federal Court, and jurisdiction is hereby conferred upon the superior court of this state, and on the supreme court on appeal, to entertain such suit, and the superior court shall, when such suit is brought, grant a stay of proceedings by any state officer or officers under such statute or order, pending the determination of such suit in the courts of the state. The superior court shall, upon the bringing of such a suit therein, at once cause a notice thereof, together with a copy of the stay order by it granted, to be filed in the Federal District Court in which the action was originally begun. The suit in the Superior court, and any appeal therefrom, shall be given precedence and in every way expedited, and shall be assigned for hearing at the earliest practicable day.

that if an act approved by referendum November 5, 1912, remained in force until the constitutional amendment of 1914 "there is no question it could not have been *changed* by the Legislature."

The Legislature could not, therefore, by the stay-statute of 1931 give the superior or supreme court power to stay proceedings by the Attorney General under the referred Train Limit law of 1912 whatever may be its power as to acts not so approved by the electorate. Suspension in such case would amount to a change because the Train Limit law makes it mandatory on the Attorney General to sue for violation of its provisions.

(b) Moreover the stay-statute could not apply to the instant cases because there are no "proceedings by any state officer" to be stayed; nor can he bring any suit in the state court "to enforce such statute" because the railroads are not disobeying it and do not intend to disobey it. If and when they are protected by a federal injunction, annuling the statute, they will disregard it.

The act does not repeal or refer to the provision in Sec. 4281, Arizona Revised Code, 1928, that "An injunction cannot be granted to * * * prevent the execution of a public statute by officers of the law for the public benefit."

The passing reference to the stay-statute makes it evident that the petitioner really desires to retry the instant case in the state court, notwithstanding the time already spent and the expense heretofore incurred. His fear of future expense evidently leaves

the inevitable expenses of a retrial out of consideration. Petitioner will be deprived of no property right if he loses the opportunity he might have had if his motion to abate the cases had been granted, to insist that the trials start *de novo* in the state court and possibly be delayed there until petitioner goes out of office; and obviously plaintiffs could not rely with safety upon any stay granted under the new and apparently unconstitutional Arizona stay statute.

The instant cases strikingly illustrate the wisdom of the substitution statute.

The effect of the substitution on the petitioner is not the usual and ordinary effect on the person or property of an individual protected by one of the cognate due-process clauses of the Fifth and Fourteenth Amendments. No deprivation of property ensues by his substitution in a case relating solely to the "future discharge of his official duties." His legislature has furnished him defense funds and indemnity; he has an adequate remedy by appeal as well as the express authority and direction of the State to continue the litigation to finality.

It cannot be perceived that any rights under the due process clause of the Fifth Amendment so jealously guarded by this Court in proper cases are infringed by a substitution in a case under the commerce clause and the due-process clause of the Fourteenth Amendment in which it appears "that there is a substantial need for continuing and maintaining the causes and obtaining an adjudication of the questions involved."

IV.

THE ARIZONA TRAIN LIMIT DEFENSE STATUTE AND THE ACTS AND AGREEMENTS OF THE STATE OFFICIALS THEREUNDER CONSTITUTED SUCH A CONSENT BY THE STATE TO THE HEARING AND ADJUDICATION OF THE SUITS THAT PETITIONER IS BOUND THEREBY.

The Arizona Train Limit Defense statute (p. 8, *supra)* is entitled "An Act to provide Funds for the Defense of Suits to Restrain the Enforcement of the Law of Arizona Limiting the Length of Freight and Passenger Trains." Section I begins —"To provide funds for the Attorney General" —whoever he may be—"to defend the rights and interests *of the people of the State of Arizona*" in the suits here involved, describing them. Claims "approved by the attorney general" are authorized. The appropriation is a continuing one, not confined to a fiscal year or to an individual. It is not for the personal relief or reimbursement of the original defendant Peterson; nor is the appropriation made to defend "the Attorney General" or his interests or to protect his property. It is clearly in the interest and for the benefit of the people of the State.

Section 3 declares that "to provide an appropriation for the support and maintenance *of a department of state*" the act shall become operative immediately. Sec. 52, Revised Code of Arizona, 1928, defining the duties of the Attorney General, includes—"8. appear *for the state* in any action in the courts of the United States, and the costs *thereof* and the expenses of the attorney general incurred *therein* shall be a legal charge against the state." The Train Limit Defense act can not be regarded as a private relief measure.

Donations by the State of Arizona are prohibited. *Roland v. State*, 24 Ariz. 116, 207 P. 359.

By making the appropriation in the form adopted the legislature stated in the most unmistakable way that the interests of the State demanded and that its legislature desired the suits defended "*for the State.*" In effect though not in form it amounted to intervention by the State. It was held in *U. S.* v. *Peters*, 5 Cranch. 115, that the Eleventh Amendment does not forbid intervention by a state to protect "any interest it may have in a subject which forms the matter of controversy between individuals" in a federal court.

Since the passage of the Train Limit Defense law on March 13, 1931, and up to the filing of petitioner's objections to substitution that law has been treated as a statutory mandate to the Attorney General "to defend the rights and interests of the people of the State of Arizona" in the pending litigation. The individual who occupies that official position should not be given the same status under the Fifth Amendment as that occupied by individuals who were considered, in the cases arising under that amendment, to have been entire strangers to the litigation.

In stipulating to the continuance for final hearing, Attorney General Peterson and his Assistant and Special Assistant stipulated as state officials. That was subsequent to the passage of the Defense statute (Return, p. 22).

In view of the Train Limit Defense statute of 1931 and with the active continuance of the Attorney Gen-

eral and his deputies therein in their official capacities it may be held on this application and on appeal —if one be lodged—that the State has taken over the litigation or has intervened therein, and in either event has waived any rights it might have under the Eleventh Amendment. For the immunity thereby conferred "is a personal privilege which it may waive at pleasure." *(Clark v. Barnard*, 108 U. S. 436.)

Such waiver need not be explicit or general and need not precede the suit in which the waiver is applicable, and there is no distinction apparent to us between a state directing its attorney general to appear for individual defendants in a tax-suit involving revenues in which it is interested, and a state providing "funds for the Attorney General to defend the rights and interests of the people of the State" in suits which assail a state statute enforcible solely by suits for cumulative penalties, which it is the continuing duty of the incumbent of the office of attorney general to institute and press.

We refer to *Gunter v. Atlantic Coast Line*, 200 U. S. 273, which was a suit against state officials, involving the effect of a former judgment against their predecessors. The judgment was held to be *res adjudicata* but the decision was on the ground that because the state had voluntarily appeared in the former suit, the judgment therein was in effect a judgment against the state, and binding on all subsequent officers thereof.

It appears that when the first suit was instituted, a state statute was in effect which, among other

things, provided with respect to tax suits brought against the County Treasurer, that:

> "If the State be interested in the revenue in said action, the county auditor shall, immediately upon the commencement of said action, inform the Auditor of State of its commencement, of the alleged cause thereof, and the Auditor of State shall submit the same to the Attorney General, who shall defend said action for and on behalf of the State."

With reference to that statutory provision and action taken thereunder, the Court said:

> "We see no escape from the conclusion that the provision last quoted, where suit was brought concerning state taxes, made a county treasurer, who was the state tax collector, an agent for the State and empowered him, 'for and on behalf of the State,' to defend the suit, and required him, in order fully to protect the interests of the State, to be represented by the highest law officer of the State, the Attorney General. . . . The answer in the Pegues case, which denied the existence of the alleged contract of exemption and asserted the existing and continuing power of the State to tax, was signed, for the defendants, by the Attorney General of South Carolina, who also, in his official capacity, verified such pleading. The word 'defendants' cannot be construed as implying any other than the county officers empowered to represent the State, without imputing to the Attorney General a failure to discharge the duty directly imposed upon him by the State. This must result from the command of the statute, that he should defend the suit, the state revenue being concerned, not merely for the county officers, but 'for and on behalf of the State,' a command which would have been wholly disregarded

> if the appearance of the Attorney General be treated as having been made solely for the purpose of representing the defendants as individuals."

Certainly equity and good conscience will not permit a state to appropriate money and direct its officials to defend and delay a suit, and then say it has no connection therewith. The acts of the Attorney General and the Assistant and Special Assistant Attorney General in procuring a continuance of the final hearing for the purpose of filing briefs and then (Return, 7) signing, as such officials, and not as attorneys, a stipulation to the effect the hearing "of all matters now or hereafter involved in both cases may be held at such time as the court may designate," became the acts of the State, binding upon the petitioner herein. He is required by the mandate of the Train Limit Defense statute to continue the defense, and by it provided with funds for that purpose. Furthermore, whenever the Attorney General appears in United States Courts for the state "the *costs* thereof and the *expenses* of the Attorney General incurred therein shall be a legal charge against the state." Sec. 52, p. 60, supra.

In *Proutt v. Starr*, 188 U. S. 537, *supra*, it appeared that the Nebraska railroad rate laws had been attacked as unconstitutional in suits brought by stockholders of various railroads, and temporary injunctions were issued. A stipulation was entered into that the Rock Island case should not be tried but that the same final decree should be entered therein as should be entered in the other cases which were to be tried. The result of the trial of the other cases in the Circuit Court was a decree adjudging the rate statutes void

"The case is within the principle that one who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own, and who does this openly to the knowledge of the opposing party, is as much bound by the judgment and as fully entitled to avail himself of it as an estoppel against an adverse party, as he would be if he had been a party to the record."

Souffront v. Compagnie des Sucreries, 217 U. S. 475, 487.

See also *Cushman v. Warren, etc. Paving Company* (C. C. A., 7th Circuit), 220 Fed. 857.

and enjoining their enforcement; and this decree was affirmed in *Smyth v. Ames*, 169 U. S. 462. In the meantime, however, a new attorney general had been elected, who claimed, as does petitioner here, that he was a stranger to the stipulation and the litigation. But this Court, in the absence of any substitution statute, found means to enforce the stipulation. If petitioner's theory be correct it could not have done so. Indeed under that theory a judgment of the District Court that a statute was in the exclusive legislative field of Congress and wholly beyond the power of a state to enact, would be only a "mere scrap of paper" so far as successors in office are concerned.

V.

DEFENDANT'S MOTION TO DISMISS THE BILLS, TO VACATE THE ORDER OF REFERENCE, AND TO SUPPRESS THE MASTER'S REPORT, WERE PROPERLY DENIED; AND IN ANY EVENT MANDAMUS CANNOT BE AVAILED OF TO REVIEW THE RULINGS OF THE DISTRICT COURT UPON THOSE QUESTIONS.

Defendant's Motion to Dismiss the Bills of Complaint.

The bills of complaint were of the conventional character used in such cases. It is true they did not allege threats, but as we have shown above that is a wholly unnecessary allegation when the command of the statute to the enforcing officer is unambiguous and mandatory; and while in some cases, even under those circumstances, lawyers have taken care to allege the making of threats in sworn bills, if they were in fact made, that is not true in all cases. Sometimes, of course, state officers attempt to place an unwarranted and unconstitutional construction on a state statute. For example in *Railroad Comm. v. T. & N. O.*

R. Co., 42 S. W. (2d) 1091, the Attorney General of Texas, in an opinion to the Railroad Commission, incorrectly construed the State Full Crew law—providing among other things for an engineer and a fireman on railroad trains—to apply to motor car operation.

In a case of that kind it would seem necessary in order to sustain a bill in equity to make a showing as to the construction intended to be placed upon the statute. That would not always be an easy matter to do because state attorney-generals ordinarily are required to furnish opinions to state officials or agencies but are neither required nor authorized to furnish them to private individuals. In these cases no such difficulty was encountered. The command of the state legislature to the Attorney General is clear: he is required by the constitution to perform such duties as are prescribed by law—that is, by the legislature—and Section 4281, Ariz. Rev. Code, 1928, prohibits the courts from issuing injunctions to "prevent the execution of a public statute by officers of the law for public benefit."

It was held in *In re State of New York*, 256 U. S. 490, that where a suit was clearly in violation of the Eleventh Amendment its prosecution would be stayed. But that was in substance a proceeding in which it clearly appeared that any judgment obtained could only be collected out of state funds. No such situation obtains here and the ordinary rule is applicable that where the state is not named as defendant the question of whether the suit is against the state within the meaning of the Eleventh Amendment is one which belongs to the merits rather than the jurisdiction. *Illinois Cent. R. Co. v. Adams*, 180 U. S. 28; *Scully v.*

Bird, 209 U. S. 481; *Morenci Copper Co. v. Freer* (C. C. W. Va. 1903) 127 Fed. 199. It is not therefore reviewable by mandamus.

Defendant's Motion to Vacate the Order of Reference.

The motion to vacate the order of reference (Return, 19-20) was made fourteen days after the order of reference had been entered over the general oral objection of defendant. The principal reason apparently relied upon was that the order violated Equity Rule 59, which limits references to cases in which some exceptional condition requires a reference. The order itself (Return, 17) recites the exceptional condition requiring the reference, and the quotation from the opening brief of the defendant before the Master, appearing on pages 4-5 of the Return, confirms the propriety of the order of reference. As defendant there states, the San Francisco hearings (at which most of plaintiffs' evidence was introduced) ran from October 15th to November 14, 1930; the Phoenix hearings (at which most of defendant's evidence was introduced) ran from November 25th to December 19, 1930, and from February 2d to February 19, 1931. Plaintiffs' rebuttal evidence ran from February 19th to March 4, 1931. The record contained over 9,000 pages, about evenly divided between the parties as to the number of witnesses and amount of space consumed by each side. While defendant's answers are not attached either to the petition or to the return, it is a fact which we are sure will not be denied, that those answers on information and belief or for lack of information denied substantially every allegation in the bills of complaint. The bills of com-

plaint (Pet. 21-78) together with the findings of the court (Return, 51-81) show the wide range and complicated character of the evidence.

Unquestionably the case was properly referred. Furthermore, if defendant was dissatisfied with the ruling and desired a review of this Court by way of mandamus proceedings (as was attempted in *Los Angeles Brush Mfg. Co. v. James*, 272 U. S. 701) it of course was his duty to present to this Court a petition on that point shortly after his motion of July 31, 1930 was denied and before the taking of evidence had begun, instead of waiting (as he has done) until about two years after the taking of evidence was completed. Review by mandamus is barred by unexplained *laches* even where the position of the parties remains unchanged. *United States ex rel v. Love*, 249 U. S. 367; *In re Eastern Cherokees*, 220 U. S. 83. But here the evidence had been taken, the Master had made his report, and the court had considered the evidence and the briefs, and heard the arguments on final hearing before the petition, in which it is sought to raise that issue, was even prepared. It should not be considered by this Court.

Defendant's Motion to Suppress

When petitioner verified his petition, the motion to suppress had not been passed upon. But before his petition had been filed, that motion by formal order was denied. (Return, 27.) That order and the findings of the court therein sufficiently show that the court's ruling was proper. In the first place, it will be noted the court considered the "briefs and the affidavits (45 printed pages, Return, p. 3, par. 5) filed

in connection with said motion, including the verified motion and the verified answer of the Master thereto, together with the Master's report and the transcript of evidence taken before the Master and the briefs and suggested findings filed by the parties before the Master." An examination of all of those was required by defendant's comprehensive motion, which is described by the court in its order of denial (Return, 27) as a "motion to suppress the Special Master's Report in the above-entitled cases, on the ground of the alleged disqualification of the Master, and upon the further ground that the Master's report was not in accordance with the evidence in the particulars set forth in defendant's exceptions." The exceptions contained 44 pages.

The quotations from the statement filed by the Master, from the Santa Fe original brief and from the original brief of defendant, filed before the Master (Return, 4-5), show clearly enough that, aside from the alleged disqualification, defendant's real complaint was that the Master should not have adopted any of the findings submitted by plaintiffs but should have adopted those he submitted. This is a proper exception or assignment of error, but it is indeed unusual to present the matter in the sensational language of the defendant partially quoted in paragraph 5 (p. 4) of his petition, where he says plaintiffs' attorneys originally wrote the findings and the Master after a few revisions and omissions merely copied them. So far as we know, a court or master may adopt without even going to the trouble of copying, if suggested findings submitted are correct; and the question on appeal is not their authorship but whether they are correct. This presupposes, of course, that the sug-

gested findings are formally filed with the master and submitted to the other side and the other side given an opportunity to answer. That was done in this case and (Return, p. 3) defendant filed the last brief.

In view of the sweeping character and charges contained in defendant's motion to ~~dismiss~~ suppress, a consideration thereof by the District Court obviously required a substantial amount of time. This motion was filed on August 17, 1932. Affidavits relating to the alleged disqualification were filed by plaintiffs at various times up to October 21, 1932; and defendant with his brief on the motion which was not filed until October 31, 1932, submitted additional affidavits. Plaintiffs' brief on the motion to suppress was not filed until November 10, 1932.

With the plaintiffs' motion brief were filed (Return, p. 6, par. 7) suggested findings and conclusions, under Equity Rule 70½. Defendant then had until December 12, 1932, to complete his brief on the merits and was thus given an opportunity to comment upon or criticize those suggested findings—which he did. He was not harmed in any way by failure of the court to pass upon the motion and there could have been no prejudice instilled into the mind of the court by reason of the fact that it had before it findings which it knew were largely prepared in the first instance by plaintiffs' attorneys and which had been adopted by the Master. The final order of the court on the motion to suppress was that the Master's report should not be given the presumptive weight to which it would otherwise be entitled under Equity Rule 61½, but that the motion be overruled. The findings in that

report doubtless were given exactly the same weight as would a statement of facts prepared and submitted by a plaintiff in any ordinary brief to a court, and afterwards answered by the defendant.

The first finding of the court in passing on the order (Return, 28) was that the detailed findings of the Master were substantially correct and set forth the principal facts established by the evidence. The court then went on to find the facts with reference to the employment of the Master's firm by the Pacific Greyhound Lines, Inc., which as stated by the Interstate Commerce Commission (Appendix D, p. 408) of its report on *Co-ordination of Motor Transportation* (182 I. C. C. 263) is a part of a nation-wide nationally known and nationally advertised system of bus lines, there referred to as "The Greyhound Lines System." The firm which the Master joined after his employment as master, had for some five years openly represented the California-Arizona branch of the Greyhound system in question and some of its constituent lines; and said firm lost the employment over seven months before the Master's report was filed. The bus line was entirely independent of the Southern Pacific, which had nothing to do with its legal affairs; and the fact that the Southern Pacific owned one-third of its capital stock, while not concealed but shown in the reports made by that company to the Interstate Commerce Commission and the Arizona Corporation Commission, nevertheless was not generally known outside of railroad and federal and state public utility commission circles, and the master (who handled none of the bus line corporate business) had no reason to know and did not know about it.

Under the circumstances, therefore, the District

Court was not required to suppress the report and seriously injure the reputation of the Master who was not responsible for and could under no theory have been blamed for the incident; nor was the District Court required to deny him further compensation. But in view of the character of the charges made and so as to remove any possible ground of complaint or claim of impropriety, the court did exactly what defendant's attorney requested and decided the cases upon the evidence taken before the Master. As stated above, plaintiffs submitted their suggested findings to the court under Equity Rule 70½ on November 10, 1932; defendant had over a month to consider them and answer them. The defendant was prejudiced in no way by the failure of the court to pass on the motion to suppress before the motion for substitution was presented and ruled upon. That failure did not (as he claims) constitute a valid reason for refusal to consent; and of course the motion can not be reviewed in this proceeding, because, among other reasons, the findings rest upon evidence not in the record before this court. *In re C. R. I. & P. Ry. Co.*, 255 U. S. 273, *supra.*

VI.

THE ACTS AND PROCEEDINGS OF THE DISTRICT COURT SUBSEQUENT TO THE SUBSTITUTION ORDER WERE WITHIN THE JURISDICTION OF THE DISTRICT COURT.

We have not seen petitioner's brief on the rule to show cause, but we assume that in addition to covering the points made in his motion brief he will deal with the acts of the District Court subsequent to the making of the substitution order. It may be he will claim in that brief that even though the substitution

order is held to be proper those subsequent proceedings were irregular or improper and hence invalid; therefore, by way of anticipation, we shall show that they were not.

We realize that in suits such as these a decree adjudging void a state law, could not properly be entered *pro confesso* as a matter of course on the default of the defendant. But no such method of procedure was adopted. After petitioner who, with his counsel on February 8, 1933 (Return p. 8) "came here (to San Francisco) prepared to argue the entire case" and after meeting "for a discussion of the situation . . . became convinced that the substitution could not lawfully be made," and, after stating they were not "delaying the court in considering the principal argument," refused to participate in the final hearing, the court directed counsel for plaintiffs to proceed with the argument. The evidence taken before the Master had then been on file with the court since July 29, 1932. The defendant's brief on the motion to suppress, which called for an examination of the record, had been on file since October 31, 1932; and plaintiffs' reply thereto since November 10, 1932; and with the latter brief plaintiffs submitted suggested findings and conclusions under Equity Rule 70½. Defendant's brief on the merits, which also called for an examination of the record, had then been on file with the court since December 12, 1932; and plaintiffs' reply thereto since January 31, 1933.

Presumably, therefore, the court, on February 8, 1933, at the time of final hearing, was familiar with the issues of law and fact involved. Its order on the

motion to suppress (Return p. 27) recited it was made after considering the briefs and affidavits of the parties and all pertinent parts of the record, including the briefs filed by the parties before the Master; and its order making findings of fact and conclusions of law, as required by Equity Rule 70½, recites (Return p. 51) that they were made "after consideration of said argument and of the briefs on the merits filed by the respective parties, and from an examination of all the evidence, but without treating the Master's report as presumptively correct and entirely independent of said Master's report."

The order on the motion to suppress (Return, p. 29) as well as the findings of fact and conclusions of law (Return, p. 88) and the final decree (Return, p. 92) were all signed by the three judges; and the two last mentioned documents were not signed until March 7, 1933—just one day less than a month after petitioner refused to participate in the final hearing. It is apparent, therefore, that the District Court gave full and proper consideration to the merits of the controversy; and so far as we can see, petitioner by his ill-advised procedure has lost nothing except the opportunity to make an oral argument to the District Court. A final decree has been entered against him, from which he has the clear statutory right to appeal. Unquestionably on that appeal he could procure a review by this Court of all the rulings of the District Court to which exceptions were taken, and we perceive no reason why he could not challenge the adequacy of the findings of fact to support the conclusions of law, or assert that the findings of fact and conclusions of law he presented to the court with his brief on final hearing should have been adopted—or

for that matter, that the findings of fact made by the District Court were not supported by the evidence.

While the law with respect to procedure in three judge cases is not wholly settled, a custom has grown up of submitting to such courts on final hearing suggested findings of fact and conclusions of law, and of thereafter assigning as error the action of the court in making the findings it enters or of failing to make those submitted. This appears to be a convenient and sensible method of procedure, which, while preserving full rights to the parties, obviates the necessity of a further formal reconvening of and hearing before the three judges after final hearing, for the purpose of procuring the allowance of formal exceptions to its orders, findings and decrees made after final hearing. That procedure was adopted in the *Western Grain Rate case* (A. T. & S. F. v. U. S. 51 F (2d) 510; 284 U. S. 248.)

Conclusion

Prior to the extension in 1925 of the Federal Substitution statute so as to include state officials, the constitutionality of state laws could be determined in suits against state officials in which the original defendants remained in office until final determination or in which substitution orders were made by agreement and without being called to the attention of the court.

Since the Federal Substitution statute has been extended to include state officials, the fact that original defendants vacated their offices for various reasons has not interfered with the orderly progress and final

determination of such suits; and the constitutionality of state laws has been speedily determined, without technical objections or difficulties, in many cases by this Court. So far as we have been able to ascertain no question as to validity of that statute has ever heretofore been raised; and unquestionably it has been a great procedural improvement. Without it the Fourteenth Amendment and other constitutional guaranties would lose much of their force and virility. There is every practical reason why it should be sustained and we respectfully submit that there is no constitutional or other legal reason why it should be struck down.

While in this brief we have discussed all the various matters raised or which conceivably could be raised by the petition and the return, we, of course, recognize that the principal question involved is the validity of the federal substitution statute; there is no question as to its applicability. However, we have shown that even without that statute the circumstances justified compulsory substitution; that nothing connected with the substitution order or any of the other proceedings set forth in the Petition and Return has operated to the prejudice or disadvantage either of the petitioner or the State of Arizona; and that the propriety of all such acts and rulings may be reviewed on appeal.

Because it does not appear that the District Court proceeded "clearly without jurisdiction," but to the contrary it appears that the District Court had full jurisdiction, petitioner's motion for leave to file the petition should be denied, the rule to show cause should be discharged, the stay order entered herein

should be vacated, and respondents should be dismissed.

Respectfully submitted,

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